Green Nurture Sdn Bhd v Wing Onn Engineering Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-1244–11 OF 2011
YAACOB MD SAM J
17 SEPTEMBER 2014

Contract — Damages — Liquidated ascertained damages — Parties entered into contract — Delays in completion of works for project — Claim for general and special damages — Allegation delay solely caused by main contractor due to financial difficulties — Whether there was agreement to waive liquidated ascertained damages — Whether there was documentary proof that waiver had been raised through letters and notices — Whether developer entitled to sum claimed — Whether main contractor succeeded in proving that developer was to pay sums

The plaintiff claimed against the defendant for the amount of RM1,021,440 as liquidated ascertained damages ('LAD') alleged due to the plaintiff for the delays in completion of the works for a project. The plaintiff also claimed for general and special damages and costs. The defendant filed a counterclaim against the plaintiff. The plaintiff was a licensed developer and had appointed the defendant as the main contractor to develop 32 units of shop ('the appointment letter') ('exh P93'). The letter stated that the contract sum is a lump sum amount of RM5.12m. The letter of appointment also required the defendant to pay RM48,000 as refundable deposit for the sale and purchase agreement of the contra units and to be refunded upon the completion of the buildings. The defendant paid a deposit of RM48,000 to the plaintiff ('P18') and took site possession and started preliminary works at the site. The plaintiff and the defendant entered into an agreement ('the letter of award')('P19') detailing terms of the appointment of the defendant as the main contractor of the project. After the letter of award was signed, there was a discussion between the plaintiff and the defendant pertaining to the method of payment. The defendant was not comfortable to proceed with contra payment method as the defendant was merely a contractor and that may affect cash flow of the defendant to complete the project within the time frame. Following the discussion, it was agreed that the new term of payment method which is a lump sum payment will be based on the architect's interim certificate which shall be paid in accordance to the progress of the said project. The plaintiff issued a letter titled 'method of payment' ('P17') to the defendant confirming an agreement that 50% of each architect interim certificate for completion of work shall be paid in cash; and the balance shall be contra with the six units shop. The plaintiff accepted the defendant's request for an adjustment of contract sum due to the drastic increase of building material price, piling

matters and other issues, and issued a letter titled 'contract sum adjustment' to the defendant, agreeing to increase the defendant's entitlement. There was delay in completion of the works by the defendant due to several disputed reasons. The plaintiff had given total extension of time of six months out of the original contract period of 15 months. The certificate of practical completion (CPC) was issued by the architect certifying the works are practically completed minus de minimis work of the project ('P57'). Certificate of fitness ('CF') was obtained for the project. The plaintiff claimed that the total numbers of delay of works is 266 days based on the commencement date 25 January 2008 and the agreed extension of time by plaintiff which was 180 days (six months). The CF for the project was issued on 30 July 2010. The plaintiff alleged that the delay was solely caused by the defendant due to the defendant's financial difficulties to complete the project within the original contract period. The plaintiff denied of any agreement to waive the LAD and contended that there was no documentary proof that waiver had been raised by the defendant in any of the defendant's letters/notices to the plaintiff during the construction period and also after the completion of the project. The issues that arose were whether the plaintiff was entitled to the sum claimed; and whether the defendant had succeeded in proving that the plaintiff was to pay the defendant the sums as per the claim in the defendant's counterclaim.

Held, dismissing the plaintiff's claim with costs and allowing the defendant's counterclaim in part with costs of RM30,000:

(1) Almost the entire terms in P93 had been incorporated into P19, except terms on mode of payment. The parties had agreed that the letter of award shall be followed. P19 made no reference whatsoever to the existence of 'P93' and for its continuance application under the contract. The commencement date of the contract took effect from 25 January 2008, the date of the LOA. Hence, it was clear that both parties agreed to be abide by P19, and P93 had been novated (see para 29).

(2) The beginning date ie 24 October 2009 for the calculation of the LAD was never an approved date of the architect. Moreover, the CPC was issued by the architect on 20 November 2009 certifying the works had been completed minus minor repairs work (see para 33).

(3) The defendant was not the only party involved and responsible in obtaining the CF as it also involved the engineers, consultants and architect. The plaintiff had never led any evidence in court to show what is the cut-off date ie the date of the application. The plaintiff had failed to tender the date when the application done for the CF. Even the architect and its representative failed to forward the exact number of days delayed by either party. The CPC was issued by the architect on 20 November 2009 certifying the works were practically completed *minus de minimis* work of the project. It must be remembered that it was the plaintiff's

appointed architect who had issued the CPC. Here the CPC was valid and the defendant had completed their works by 20 November 2009 (see para 34).

(4) The LAD shall not cease when CF was issued. The plaintiff had failed to take into consideration various other causes that had delayed the project which were not under the sole control of the defendant. There was no certification issued by the architect certifying the number of days delayed by the defendant. The plaintiff had failed to give an accurate approved date for the claims for the LAD and that the LAD ended on the date the CF was obtained (see para 37).

(5) The letter by the plaintiff in 'D1' clearly stated the amount of RM50,000 was paid to the defendant with an instructions that the defendant have to complete 'all the requirements (ie site works) imposed by the authority (MPK-Road & Drain matter, MPK letter dated 6 April 2010) in three week' from the date of the letter. It was a payment for VO works and not part of the original contract sum. The court allowed the defendant's claim for the sum of RM 57,600.83 being the outstanding amount due from the main contract (see para 50).

(6) The plaintiff had failed to prove its claim on the balance of probabilities. The defendant had discharged the onus of establishing their pleaded case and had succeeded in proving the defendant's counter claim on the balance of probabilities (see paras 73–74).

[Bahasa Malaysia summary

Plaintif telah menuntut terhadap defendan untuk jumlah RM1,021,440 sebagai ganti rugi jumlah tertentu ('GJT') yang dikatakan harus dibayar kepada plaintif kerana lewat menyiapkan kerja-kerja untuk satu projek. Plaintif juga telah menuntut untuk ganti rugi am dan khas dan kos. Defendan telah memfailkan tuntutan balas terhadap plaintif. Plaintif merupakan pemaju berlesen dan telah melantik defendan sebagai kontraktor utama bagi memajukan 32 unit kedai ('surat pelantikan') ('eksh P93'). Surat itu menyatakan bahawa jumlah kontrak itu adalah jumlah sekali gus sebanyak RM5.12 juta. Surat pelantikan itu juga menghendaki defendan membayar RM48,000 sebagai deposit yang boleh dikembalikan untuk perjanjian jual beli untuk unit-unit kontra itu dan hendaklah dikembalikan selepas bangunan-bangunan itu siap. Defendan telah membayar deposit RM48,000 kepada plaintif ('P18') dan mengambil milikan tapak itu dan memulakan kerja-kerja awal di tapak tersebut. Plaintif dan defendan telah memasuki perjanjian ('surat award') (P19') yang memperincikan terma pelantikan defendan sebagai kontraktor utama projek itu. Selepas surat award itu ditandatangani, terdapat perbincangan antara plaintif dan defendan berkenaan cara pembayaran. Defendan tidak selesa untuk meneruskan secara bayaran kontra kerana defendan hanya seorang kontraktor dan ia mungkin

menjejaskan aliran tunai defendan untuk menyiapkan projek itu dalam tempoh jangka masa. Berikutan perbincangan itu, adalah dipersetujui bahawa terma bayaran baru iaitu bayaran sekali gus akan berdasarkan sijil sementara arkitek yang hendaklah dibayar menurut pelaksanaan projek tersebut. Plaintif telah mengeluarkan surat bertajuk 'method of payment' ('P17') kepada defendan mengesahkan satu perjanjian bahawa 50% daripada setiap sijil sementara arkitek untuk kerja yang telah disiapkan hendaklah dibayar secara tunai; dan bakinya hendaklah dikontrakan dengan enam unit kedai. Plaintif telah menerima permintaan defendan untuk pelarasan jumlah kontrak itu akibat peningkatan mendadak harga bahan binaan, bahan cerucuk dan isu lain, dan mengeluarkan surat bertajuk 'contract sum adjustment' kepada defendan, dengan bersetuju untuk meningkatkan kelayakan defendan. Kelewatan berlaku dalam menyiapkan kerja-kerja oleh defendan akibat beberapa sebab yang dipertikaikan. Plaintif telah memberikan sejumlah enam bulan lanjutan masa daripada tempoh kontrak asal selama 15 bulan itu. Sijil amalan siap ('SAS') yang dikeluarkan oleh arkitek bagi mengesahkan kerja-kerja secara praktik telah siap tanpa mengira kerja de minimus projek itu ('P57'). Sijil layak menduduki ('SLM') telah diperoleh untuk projek itu. Plaintif mendakwa bahawa jumlah bilangan kelewatan kerja adalah 266 hari berdasarkan tarikh siap 25 Januari 2008 dan lanjutan masa yang dipersetujui oleh plaintif iaitu 180 hari (enam bulan). SLM untuk projek itu telah dikeluarkan pada 30 Julai 2010. Plaintif mendakwa bahawa kelewatan itu semata-mata disebabkan oleh defendan akibat masalah kewangan defendan untuk menyiapkan projek itu dalam tempoh kontrak asal. Plaintif menafikan terdapat perjanjian untuk mengetepikan GJT itu dan berhujah bahawa tiada bukti dokumentar bahawa penepian itu telah ditimbulkan oleh defendan dalam mana-mana surat/notis defendan kepada plaintif sepanjang tempoh pembinaan dan juga selepas siap projek tersebut. Isu-isu yang timbul adalah sama ada plaintif berhak terhadap jumlah yang dituntut; dan sama ada defendan berjaya membuktikan bahawa plaintif hendaklah membayar defendan jumlah sepertimana dituntut dalam tuntutan balas defendan.

Diputuskan, menolak tuntutan plaintif dengan kos dan membenarkan sebahagian tuntutan balas defendan dengan kos sebanyak RM30,000:

(1) Hampir keseluruhan terma dalam P39 telah dimasukkan ke dalam P19, kecuali terma tentang cara bayaran. Pihak-pihak telah bersetuju bahawa surat award hendaklah diikut. P19 tidak membuat rujukan apapun tentang kewujudan 'P93' dan untuk permohonan penerusannya di bawah kontrak itu. Tarikh mula kontrak itu berkuat kuasa mulai 25 Januari 2008, tarikh GJT itu. Justeru, adalah jelas bahawa kedua-dua pihak bersetuju untuk mematuhi P16, dan P93 telah diserahkan haknya (lihat perenggan 29).

(2) Tarikh permulaan iaitu 24 Oktober 2009 untuk pengiraan GJT bukan tarikh yang diluluskan oleh arkitek. Tambahan pula, SAS telah

dikeluarkan oleh arkitek pada 20 November 2009 mengesahkan kerja-kerja telah disiapkan tanpa mengira kerja pembaikan kecil (lihat perenggan 33).

(3) Defendan bukan sahaja pihak yang terlibat dan bertanggungjawab dalam memperoleh SLM kerana ia juga melibatkan jurutera, perunding dan arkitek. Plaintif tidak mengemukakan apa-apa keterangan di mahkamah untuk menunjukkan apakah tarikh tamat iaitu tarikh permohonan itu. Plaintif telah gagal menenderkan tarikh bila permohonan itu dilakukan untuk SLM. Malah arkitek itu dan wakilnya gagal mengemukakan bilangan hari lewat yang tepat oleh kedua-dua pihak. SAS itu telah dikeluarkan oleh arkitek pada 20 November 2009 mengesahkan kerja-kerja telah siap secara praktiknya tanpa mengira kerja-kerja *de minimus* projek itu. Perlu diingat bahawa ia adalah arkitek yang dilantik oleh plaintif yang telah mengeluarkan SAS itu. Di sini SAS adalah sah dan defendan telah menyiapkan kerja mereka pada 20 November 2009 (lihat perenggan 34).

(4) GJT itu tidak patut terhenti apabila SLM dikeluarkan. Plaintif telah gagal mengambil kira pelbagai sebab lain yang telah melengahkan projek itu yang bukan di bawah kawalan mutlak defendan. Tiada pensijilan yang dikeluarkan oleh arkitek mengesahkan bilangan hari lewat oleh defendan. Plaintif telah gagal memberikan tarikh kelulusan yang tepat untuk tuntutan bagi GJT itu dan bahawa GJT tamat pada tarikh SLM diperoleh (lihat perenggan 37).

(5) Surat oleh plaintif dalam 'D1' jelas menyatakan jumlah RM50,000 telah dibayar kepada defendan atas arahan agar defendan hendaklah menyiapkan 'all the requirements (ie site works) imposed by the authority (MPK-Road & Drain matter, MPK letter dated 6 April 2010) in three week' dari tarikh surat itu. Ia adalah bayaran untuk kerja-kerja VO dan bukan sebahagian daripada jumlah kontrak asal. Mahkamah membenarkan tuntutan defendan untuk jumlah RM57,600.83 sebagai baki jumlah yang kena dibayar daripada kontrak utama (lihat perenggan 50).

(6) Plaintif telah gagal untuk membuktikan tuntutannya atas imbangan kebarangkalian. Defendan telah melepaskan beban membuktikan kes yang dipli oleh mereka dan berjaya membuktikan tuntutan balas defendan atas imbangan kebarangkalian (lihat perenggan 73–74).]

Cases referred to

CM Indah Sdn Bhd (dahulunya dikenali sebagai Chai Mio Constructions Sdn Bhd) v UB Usahabina Sdn Bhd [2006] MLJU 426, HC (refd)

Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor [2014] 1 MLJ 287, CA (refd)

Renofac Builders (M) Sdn Bhd v Chase Perdana Bhd [1999] 5 MLJ 506, HC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 103
Contracts Act 1950 s 63,

Amritpal Singh (Amritpal Singh) for the plaintiff.
Renuka Devy Krishnasamy (V Samy & Co) for the defendant.

Yaacob Md Sam J:

INTRODUCTION

[1] The claim by the plaintiff against the defendant is for the amount of RM1,021,440 as liquidated ascertained damages ('the LAD') which is alleged due to the plaintiff for the delays in completion of the works for the project known as 'Cadangan Membina 32 Unit Kedai Pejabat Dua Tingkat Di Atas lot PT 418-PT427, PT 467-PT474, PT480-PT481, PT 12–330–1341 dan Satu Unit Pencawang Elektrik Di Dalam Bangunan PT1336, Jalan Raja Mokhtar 2/KU 13, Pekan Kapar, Klang, Selangor'. Plaintiff also claim for general damages, special damages and costs.

THE DEFENDANT'S COUNTERCLAIM

[2] The defendant had filed counterclaim against the plaintiff for the following orders:

(a) RM57,600.83 being the outstanding amount of the contract sum;

(b) RM255,600 being the retention sum of 5% of the total contract sum for the project;

(c) RM48,500 being refundable deposit sum paid by the defendant during the execution of the initial agreement letter dated 14 September 2007;

(d) RM212,500 being the half share unit of the defendant for the unit No PT 468;

(e) RM15,300 as special damages being the cost of repair works for the broken windows at the project site;

(f) RM249,000 for variation of works done by the defendant;

(g) general damages;

(h) exemplary damages;

(i) interest;

(j) costs; and

(k) other reliefs.

THE TRIAL

[3] The plaintiff called three witnesses, namely Goh Chor Seng (SP1) a project manager representing Mohd Riza Architect who is the architect for the project, Ng Chai Guan ('SP2') the plaintiff's director, and Hj Mohd Riza Hj Ismail ('SP3') the architect of the project.

[4] The defendant called two witnesses, Dato' Seri Chan Hock Chuan (DW1) the director of the defendant, and Bernard Chan Chee Neng ('DW2') the defendant's project manager.

BACKGROUND FACTS

[5] The plaintiff is a licensed developer. On 14 September 2007, the plaintiff issued a letter of appointment appointing the defendant as the main contractor to develop 32 units of shop in Pekan Kapar, Klang, Selangor ('the appointment letter') ('exh P93'). The letter stated that the contract sum is a lump sum amount of RM5.12m and to be satisfied by way of contra sum as follows:

(a) RM2.6m shall be paid by the plaintiff in cash; and

(b) the plaintiff shall contra the balance by way of five standard size intermediate shop units at launching price of RM388,000 per unit and one corner unit of the two storey shop unit at launching price of RM572,000 (the total contra unit amounts to RM2,512,000).

[6] The letter of appointment also required the defendant to pay RM48,000 as refundable deposit for the sale and purchase agreement of the contra units and to be refunded upon the completion of the buildings.

[7] On 18 October 2007, the defendant paid a deposit of RM48,000 to the plaintiff ('P18'). On 1 November 2007, the defendant has taken site possession and started preliminary works at site ie clearing and levelling the site, installation of hoarding etc.

[8] On 22 November 2007, Perunding Cergas (Civil & Structural Engineer) the project consultant issued road and drain drawings to the defendant ('P20A'). On 14 December 2007, the structural drawings were

issued to the defendant ('P20B'). On 31 December 2007, Mohd Riza Architect issued project signboard plan to the plaintiff ('P20C'). A

[9] On 25 January 2008, the plaintiff and the defendant entered into an agreement ('the letter of award')('P19') detailing terms of the appointment of the defendant as the main contractor of the project. B

[10] The basic terms of the letter of award (P19) is:

(a) total contract sum is lump sum amount of RM5.112m (make up of RM2.6m cash and six units of shop worth RM2.512m) without quantities and variation order; C

(b) the scope of work is to complete the works according to the construction drawings issued or to be issued by the consultants and standard of work done shall be to the satisfaction of consultants and authorities and the work shall be completed accordance to the letter of award and pertubuhan arkitek malaysia (PAM) contract; D

(c) contract period/the overall completion shall be 12 months from the commencement date and additional three months for the application of CF; E

(d) liquidated ascertained damages (LAD) shall be RM120 per day/unit for delay exceed the contract period; and

(e) prior to hand over of the building works to the developer and the issuance of the certificate of practical completion (CPC), the contractor shall obtain clearance letters from all relevant authorities for the purpose of certificate of fitness (CF). F

[11] After the letter of award was signed, on 28 January 2008, there was a discussion between the plaintiff who was representing by SP2 and the defendant who was representing by DW1 pertaining to the method of payment. The defendant was not comfortable to proceed with contra payment method as the defendant is merely a contractor and that may affect cash flow of the defendant to complete the project within the time frame. Following the discussion, it was agreed that the new term of payment method which is a lump sum payment will be based on the architect's interim certificate which shall be paid in accordance to the progress of the said project. G H

[12] On 1 February 2008, the plaintiff issued a letter titled 'method of payment' to the defendant confirming an agreement as follows ('P17'): I

(a) that 50% of each architect interim certificate for completion of work shall be paid in cash; and

(b) the balance shall be contra with the six units shop (PT No 469 to 474).

[13] On 20 March 2008, the plaintiff accepted the defendant's request for an adjustment of contract sum due to the drastic increase of building material price, piling matters and other issues, and issued a letter titled 'contract sum adjustment' to the defendant, agreeing to increase the defendant's entitlement by 1/2 unit of the standard two storey shop office (unit No 25 of PT No 468). The defendant will be paid with half of the sale proceed once the unit is sold ('P24').

[14] In total Mohd Riza Architect had issued 21 certificates of payment stating the amount certified for the defendant's progress claims ('P22A' to 'P22BL').

[15] However, there was delayed in completion of the works by the defendant due to several disputed reasons. The plaintiff had given total extension of time of six months out of the original contract period of 15 months. On 20 November 2009, the certificate of practical completion (CPC) was issued by the architect certifying the works are practically completed *minus de minimis* work of the project ('P57'). On 13 July 2010, certificate of fitness (CF) was obtained for the project.

THE PLAINTIFF'S CASE

[16] The plaintiff claimed that the total numbers of delay of works is 266 days based on the commencement date 25 January 2008 and the agreed extension of time by plaintiff which is 180 days (six months). The CF for the project was issued on 30 July 2010. The plaintiff alleged that the delay was solely caused by the defendant due to the defendant's financial difficulties to complete the project within the original contract period.

[17] The plaintiff had calculated the sum of RM1,021,440 as liquidated ascertained damages (LAD) from the defendant. The plaintiff's calculation for LAD is for the number of 266 days from 24 October 2009 to 13 July 2010. SP2 had given the breakdown calculation as follows:

> RM120 x 266 x 32units= RM1,021,440
>
> Therein deducted the following sum
>
> RM1,021,440 - RM48,000 - RM7,601 - RM255,600 = RM710,239 the plaintiff's claim against the defendant in this suit.

[18] The plaintiff denied of any agreement to waive the LAD and contended that there is no documentary proof that waiver has been raised by the defendant in any of the defendant's letters/notices to the plaintiff during the construction period and also after the completion of the project.

THE DEFENDANT'S CASE

[19] It is the defendant's case that the plaintiff had upon execution of the final agreement dated 25 January 2008 (P19) approached the defendant sometime in late February 2008 and requested for the mode of payment of the contract sum to be made partly in cash and by way of contra units, with an understanding that if there be any delay the plaintiff would not claim for the LAD against the defendant.

FINDINGS AND DECISION

ISSUES TO BE TRIED

[20] Issues to be ventilated are as follows:

(a) whether the plaintiff is entitled to the liquidated ascertain damages (LAD) as per the claim (RM710,239 after the set off); and

(b) whether the defendant had succeeded in proving that the plaintiff is to pay the defendant the sums as per the claim in the defendant's counterclaim.

Whether the plaintiff is entitled to the liquidated ascertain damages (LAD) (RM710,239 after set-off)

[21] Learned counsel for the plaintiff submitted that the issue on the entitlement to LAD is governed by the letter of award dated 25 January 2008 (P19). It was contended that the terms in letter of award ('LOA') override the terms in PAM contract. It is the plaintiff averments that both the agreements P93 (letter of appointment) and P19 (letter of offer) are valid and to be read together.

[22] Clause 7 of the LOA states that the LAD for delay exceed the contract period shall be at RM120 per day/unit. Clause 6 of the LOA provides that the overall completion period for the works shall be 12 months from the commencement date, the contractor are allowed an additional three months from the expiry of the 12 months completion period for the purpose of application of certificate of fitness from the relevant authorities.

[23] Learned counsel for the plaintiff also made reference to cl 16(iv) of the LOA which provides that prior to hand over of the building works to the developer and the issuance of the certificate of practical completion, the contractor (defendant) shall:

(a) complete all works including all variation works if any;

(b) ensure that all the works completed at site must be approved and accepted by the relevant consultant and local authorities;

(c) rectified and make good all the defective incomplete and unacceptable works; and

(d) obtain clearance letters from all relevant authorities for the purpose of certificate of fitness.

[24] The plaintiff further contended that cl 22 of PAM contract has been overridden by cll 7 and 16 of the LOA on the reason that there is no practical utility in the said cl 22 in the face of a provision of appendix D of the LOA which states that where there is inconsistency between PAM contract and the LOA dated 25 January 2008, the LOA takes precedent.

[25] Clause 22 of PAM agreement and conditions of building contract private edition without quantities in Appendix D of the LOA ('P19') provides:

> 22.1 If the Contractor fails to complete the Works by the Date of Completion or within any extended time fixed under Clause 23.0 or sub-clause 32.1(iii) and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then the Contractor shall pay to the Employer a sum calculated at the rate stated in the Appendix as Liquidated Ascertained Damages (LAD) for the period from the date for completion or any extended date where applicable to the date of Practical Completion. The Employer may deduct such sum as debt from any monies due or to become due to the Contractor under this Contract.

[26] It was contended by the plaintiff that pursuant to cl 7 read together with cl 16 of the LOA, the LAD shall cease when the CF is issued and it is difference from cl 22 of PAM contract that states LAD shall cease on practical completion. Thus, it was contended that the LAD shall cease only on 30 July 2010 upon the issuance of the CF.

[27] It was also submitted for the plaintiff that the arguments of the defendant that the LAD had been waved by the plaintiff was never pleaded in the defence and was only raised for the first time in the witness statement of the DW1 and DW2 and is merely an afterthought.

[28] Learned counsel for the defendant on the other hand contended that the initial agreement 'P93' had been replaced by the final agreement 'P19' thereby having the effect that it need not be performed. It is submitted that the subsequent agreement dated 25 January 2008 ('P19') which had alterations to the agreement 'P93' were entirely different from what had been envisaged in the initial agreement ('P93'). In that event the parties had agreed to abide by the new agreement ('P19').

[29] Having considered the evidence and the submission, I agree with the defendant on this aspect. Perusing the LOA dated 25 January 2008 ('P19'), almost the entire terms in the letter of appointment in 'P93' dated 14 September 2007 had been incorporated into 'P19'. except terms on mode of payment. It is pertinent to note that at p 13 of Bundle D1 ('P19') clearly stated that the parties had agreed that the letter of award (LOA) dated 25 January 2008 ('P19') shall be followed. 'P19' made no reference whatsoever to the existence of 'P93' and for its continuance application under the contract. SP1 has testified that the commencement date of the contract took effect from 25 January 2008, the date of the LOA. Hence, it is clearly here that both parties agreed to be abide by 'P19'. and 'P93' had been novated.

[30] Section 63 of the Contracts Act 1950 states:

> If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

[31] In the case of *Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor* [2014] 1 MLJ 287 the court of Appeal at p 313 had held:

> [50] Abdul Malik bin Ishak J (now JCA) in *Mawar Awal (M) Sdn Bhd v Kepong Management Sdn Bhd & Anor* [2005] 6 MLJ 132, at p 150 made reference to 'novation' in this way:
>
> > (38) It is ideal to mention that section 63 of the Contracts Act 1950 on novation is of wider import. Indeed this w as the view held by Visu Sinnadurai J in *Polygram Records Sdn Bhd v The Search* [1994] 3 MLJ 127; [1994] 3 CLJ 806; [1994] 3 AMR 2060 and I certainly share his view . His Lordship Visu Sinnadurai J in that case aptly said:
> >
> > > Section 63 is not limited in its scope to novation as it is understood under English Law alone, but also covers situations w here the parties have rescinded the earlier contract, by substituting a new one. If there is an intention on the part of both the parties to substitute a new contract, the old need not be performed, even if the new merely alters certain terms of the old. The test basically is this: if a new contract is entered into by the parties, whatever its terms, the old contract is extinguished. It does not, however, cover a situation w here the terms of the old contract are merely altered or varied, without a new contract in substitution of it being entered into. In such a case, the old contract, as altered or varied, remains in force.

[32] The plaintiff had calculated the sum of RM1,021,440 as LAD from the defendant. The plaintiff's calculation for LAD is for the number of 266 days from 24 October 2009 to 13 July 2010 the date of the issuance if the CF. SP2 had given the breakdown calculation as follows:

> RM120 x 266 x 32 units = RM1,021,440 Therein deducted the following sum:

RM1,021,440 - RM48,000 - RM7,601 - RM255,600 = RM710,239 (the plaintiff's claim against the defendant).

[33] The question is where in the agreement ('P19') does it state or allow the plaintiff to calculate for LAD until the date of issuance of the certificate of fitness ('CF') ie 13 July 2010? And further who approved the extension of time until 24 October 2009? SP1 the architect's representative had confirmed in his evidence that it is the architect who is to approve the extension of time and in this case the reasons for extension of time was never assessed by the architect. Thus, this court finds the beginning date ie 24 October 2009 for the calculation of the LAD is never an approved date of the architect. Moreover, the certificate of practical completion was issued by the architect on 20 November 2009 certifying the works had been completed minus minor repairs work.

[34] Clause 7 of the LOA ('P19') states that contract period is 12 months and additional 3 months for the application for the CF from relevant authorities. The word to be noted here is 'for the application' which is to be interpreted as once the application is done that is the cut of date for LAD. However, from the evidence, I find the defendant is not the only party involved and responsible in obtaining the CF as confirmed by SP1 during cross-examination. It also involves the engineers, consultants and architect. The plaintiff had never led any evidence in court to show what is the cut-off date ie the date of the application. The plaintiff had failed to tender the date when the application done for the CF. Even SP3 the architect and its representative SP1 failed to forward the exact number of days delayed by either party. SP1 and SP2 had both admitted that in their evidence that the engineers and the consultants are appointed by the plaintiff. As mentioned earlier, the certificate of practical completion ('CPC') was issued by the architect on 20 November 2009 certifying the works are practically completed *minus de minimis* work of the project ('P57'). SP1 had given evidence that these *de minimis* works relates to 'clearance of rubbish'. Although SP2 had disputed this fact and urged this court to making a finding that the works of the defendant was not completed even though the CPC was issued, the plaintiff had never raised any such prayers in their pleadings. It must be remembered that it was the plaintiffs appointed architect who had issued the CPC. Here the CPC is valid and the defendant had completed their works by 20 November 2009.

[35] Assuming based on the undisputed fact that there was extension of time to 24 October 2009, if at all there be any LAD demands it should be from 24 October 2009 to 20 November 2009, but then the plaintiff had failed to prove this fact, as by failing to tender all of the EPS Forms 1–19.

[36] Apart from that, it is clear that out of the 32 units the defendants owns 6 ½ units. However, this was further not deducted by the plaintiffs in their LAD calculation. The number of 266 days x 32 unit x RM120 also includes the defendant's units which the plaintiff is not entitled to claim and there is no deduction for the number of days delayed caused by the plaintiff's inaction.

[37] Under the circumstances, with respect I disagree with the plaintiff's contention that the LAD shall cease when CF was issued. The plaintiff had failed to take into consideration various other causes that had delayed the project which are not under the sole control of the defendant. Further, there is no certification issued by the architect certifying the number of days delayed by the defendant. The plaintiff had failed to give an accurate approved date for the claims for the LAD and that the LAD ends on the date the CF is obtain which is not stated in 'P19'. Neither SP1 nor SP2 or SP3 is able to explain or confirm an accurate calculation as to the number of days. SP1 during cross-examination had agreed that the architect certificate certify the number of days delayed is needed in this case. He further confirms the same during re-examination.

[38] This court is of the view that since LAO does not provide on method how the LAD to be calculated, it must fall back to the method provided under cl 22.1 of PAM contract. Thus, the certification of the architect is required.

[39] It was submitted for the defendant that there had been an oral agreement by the SP1 to waive the LAD. Below is the evidence of DW1 during examination-in-chief on this issue of waiver:

Q18: Is the agreement that the plaintiff will not have any LAD claims against the defendant in writing?

A: No, it was agreed orally and it also can be seen by way of conduct ie. they never issued and architect's certificate in writing certifying any claim for LAD nor did the plaintiff or architect at any point of time put us on notice of LAD claims.

...

Q23: Do you have any knowledge why the architect did not specify in writing any LAD claim?

A: Yes, it was agreed by the plaintiff and defendant for the plaintiff not to claim LAD if the payment was made by way of contra amounts. In return, that is the reason why the defendant had also not taken any action for all short fall payment by the plaintiff for each of the Interim Certificate of payment by the architect.

[40] It was submitted for the defendant that from all of the correspondences between the plaintiff and the defendant, the plaintiff never at any point of time raise their demands for any sum of the LAD or notify the defendant of their

intention to demand for LAD. Hence, it was submitted that the defendant's version that there was an agreement to vary the mode of payment with an understanding not to claim LAD is the more probable version.

[41] The plaintiff had challenged the DW1's evidence by saying that the variation to the mode of payment and the waiver of the LAD is an afterthought and untrue as it was never pleaded in the defendant's defence and that there is no documentary proof in any document that this waiver has been raised by the defendant from the year 2008 until year 2010. It was also contended that this issue was only raised for the first time by DW1 during trial. I agree with the plaintiff on this issue. It is trite that parties are bound by their pleadings. Waiver of this nature which has huge financial implication and an important matter of a contract would have been recorded in writing, but was not done. Surely, the one that to be benefited from this waiver is the defendant. The burden of proof lies on the defendant to proof on a balance of probabilities that there is an understanding to waive the LAD due to the change in the mode of payment, which the defendant had failed to prove the same (ss 101 and 103 of the Evidence Act 1950). However, my finding here does not absolve the plaintiff with the fact that the plaintiff had failed to show the exact and correct calculation of the LAD.

[42] Having considered the evidence in totality, I am of the considered opinion that the plaintiff had failed to proof its case on the LAD claims on the balance of probabilities. The plaintiff's claim is therefore be dismissed with costs.

[43] I will now deal with the second issue, the defendant's counterclaim.

(a) *the sum of RM57,600.83 being outstanding amount from the contract sum*

[44] There are two versions put forward by the plaintiff and the defendant on this claim. The plaintiff claims that out of the contract sum payable by cash, the amount due and owing is only RM7,600.83, which does not include RM50,000.

[45] It is not disputed by the parties that the plaintiff had paid the sum of RM50,000 on 15 April 2010 (D1 p 269 Bundle D1). Both parties had tendered their respective versions of the calculation for the total amount of the project. The plaintiff's version can be found at exh P23A (p 882 Bundle D3) whereas the defendant's version can be found at exh D5 (pp 1–2 of Bundle G).

[46] There is only a slight difference between the two versions of the total calculation ie why was the payment of RM50,000 made by the plaintiff?

[47] It is the defendant's averment that the sum of RM50,000 had been paid towards the variation of works amount (VO). The evidence for this can be found at exh P91 (p 396 of Bundle D2) and exh P92 (pp 397–399 of Bundle D2).

[48] The defendant had vide exh P92 forwarded the quotation for the additional/variation works to the plaintiff. The defendant had requested for payment to be made for VO works. By a letter dated 15 April 2010, in response to the defendant's request, the plaintiff had paid the sum of RM50,000 towards the VO works. Although this is denied by the plaintiff but it is clearly stated in the plaintiff's letter (D1) that '*please note that via telephone conversation, your Mr Bernard Chan has confirmed that the latest date to complete all the requirements (ie site work) imposed by authority (MPK-Road & Drain matter, MPK letter dated 6/4/10) is 3 weeks from the date hereof and the next payment shall be made only upon the issuance of CF*'. Thereafter the defendant had written to the plaintiff confirming receipt of the said RM50,000 and the purpose of the said payment ie which states that it was made for the purposes of VO works (P91). The plaintiff did not reply to this letter denying its contents. As highlighted above from the contents of D1 is rather clear that it relates to variation work as it refers to the MPK's letter dated 6 April 2010 (P88 p 356 of Bundle D1) and the quotation for the said works in P92 refer to the works as mentioned in P88.

[49] It was submitted for the defendant that the amount paid is clearly towards the variation works (VO) claim by the defendant.

[50] I agree with the defendant on this issue. Letter by the plaintiff in D1 dated 15 April 2010 clearly stated the amount of RM50,000 was paid to the defendant with an instructions that the defendant have to complete 'all the requirements (ie site works) imposed by the authority (MPK-Road & Drain matter, MPK letter dated 6 April 2010) in three week from the date of the letter. It is a payment for VO works and not part of the original contract sum. As such I allow the defendant's claim for the sum of RM57,600.83 being the outstanding amount due from the main contract.

(b) *The sum of RM255,600 being 5% retention sum from the contract sum*

[51] I find that this amount is a non-issue as the Architect's Certificate No 21 had been issued on 4 October 2011 (P22BL p 67 Bundle G) confirming that the plaintiff is to release the said 5% retention sum, in the sum of RM255,600. Further the plaintiff themselves had admitted this amount in their statement of claim dated 2 November 2011 at para 25 (p 10 of Bundle A–pleadings).

[52] Hence, since this amount is not disputed the plaintiff is to pay the defendant the sum of RM255,600.

(c) *The sum of RM48,000 being refundable deposit amount paid by the defendant to the plaintiff.*

[53] The proof of this payment is marked as P18 dated 18 October 2007 (p 4 Bundle D1).

[54] The plaintiff (SP2 Ng Chai Guan's evidence) had disputed this amount during cross-examination by saying that this payment is made towards the deposit of the contra units. However this amount is admitted by the plaintiff in their statement of claim (refer para 25 at p 10 of Bundle A–pleadings) as refundable amount. It is trite law that parties are bound by their pleadings. Under these circumstances the sum of RM48,000 is a refundable amount. Thus, the defendant's claim is allowed.

(d) *The sum of RM249,283 for variation of works (VO) done by the defendants*

[55] The defendant had in toto claimed for the sum of RM299,283 for variation works (VO) from the plaintiff. It was the defendant's stand that the plaintiff had paid the sum of RM50,000 (payment made on 15 April 2010 vide D1) towards the MPK variation works. Hence, upon deducting the sum of RM50,000 the defendant claims for the sum of RM249,283 for the amount for variation of works done and completed by the defendant.

[56] The plaintiff upon completion of the project had refused to pay the defendant any amount for the variation works, disputing on two grounds which are:

(a) that the contract is a lump sum contract without variation and quantities; and

(b) that there is no architect's certificate for the variation works done.

The first issue (a): That the contract is a lump sum contract without variation and quantities

[57] It is an undisputed fact that the final contract P19 (pp 9–84 of Bundle D1) states that the contract is a lump sum contract without variation and quantities.

[58] The issue here is for this court to determine the meaning of concept '*lump sum contract without variation and quantities*'

[59] This concept had been considered in the case of *CM Indah Sdn Bhd (dahulunya dikenali sebagai Chai Mio Constructions Sdn Bhd) v UB Usahabina Sdn Bhd* [2006] MLJU 426 where the court (Low Hop Bing J) held as follows:

(13) It is essential for me to set out the legal effect of a 'lump sum contract' in relation to construction building contracts. For this purpose I find it instructive to refer to the views of the learned authors.

(14) In *Building Contract Litigation* by Robert Fenwick Elliot, at pp 1–2, the following passage appears:

(a) Lump sum contract

A lump sum contract is a contract whereby the contractor agrees for a pre-agreed price to execute certain defined buildings (the building work undertaken by the contractual obligation is usually called the 'Works'). In principle, the contract is very simple but in practice there are many complicating factors.

The general rule in ordinary lump sum contracts is that the contractor is entitled to be paid the pre-agreed lump sum as and when he substantially completes the Works (*Hoenig v Isaacs* [1952] 2 All ER 176).

Substantial completion does not necessarily entail the perfect execution of every detail of the Works, and if the contractor is guilty of only comparatively minor defects and/or omissions then he is entitled to be paid the lump sum less a set-off respect of his failings ...

...

Although the lump sum is always the starting point, it is comparatively rare for the price the contractor is entitled to receive at the end of the day to be exactly the same as the lump sum. The lump sum is usually subject to adjustment for extra work, fluctuations sub-contractor and so on.

(16) I adopt and apply the above statements.

(17) In the instance case although parties herein have entered into a lump sum contract, the plaintiff as the contractor is nevertheless entitled to claim further payments if extra work in the form of variations and additional works had been carried out and completed, as agreed by the contracting parties.

[60] The letter of award (LOA) states that the contract is based on the PAM schedule and conditions, hence parties are bound by the terms in the PAM Schedule and Condition. The relevant cl which is applicable here is cl 11 of the PAM which guides on the issue pertaining variations works as follows:

Clause 11.5(i): the price in the Schedule of Rates after adjustment if necessary as provided in cl 13.3 of these Condition, shall determine the valuation of work of similar character executed under similar conditions as the work priced therein, (p. 62 of Bundle D1).

[61] Premised on the above reasons, the defendant is not precluded of its entitlement on the amount for the variation of works done and completed by the defendant.

The second issue (b): The fact that there is no architect's certificate certifying the VO works done and completed by the defendant

[62] It is not disputed that there is no architect's certificate for the variation of works done by the defendant. However it does not mean that the defendant is precluded from its entitlement for the VO works carried out and completed.

[63] In *Renofac Builder (M) Sdn Bhd v Chase Perdana Bhd* [1999] 5 MLJ 506, a reference was made to the 'absence of architect's certificate'. Abdul Malik Ishak J (as he then was) held as follows:

> Absence of architect's certificate:
>
> ... The headnote by the headnoter in *Eaglesham*'s case at p 169 to p 170 ought to be reproduced and it was worded in this fashion:
>
> > Held, that the provision of cl 26, making it a condition precedent to the contractor's right of action that he should have the certificate of the Architect that the amount claimed was due to him under unaffected cl 27, and in the absence of a certificate the plaintiff was not entitled to maintain the action unless he could show (and in this he failed to show) improper dealings between the employer and the Architect.

[64] Thus, as a general rule if there is no architect's certificate certifying the variation works then contractors are not entitled to the VO works claim. However, there is an exception to this rule, which the exception when this rule is not applicable ie if it can be shown that there was improper dealings between the employer and the architect for the failure/refusal of the architect to issue the certificate.

[65] In the instant case, the defendant contended that from the following facts highlighted below, there exist improper dealings between the architect and the plaintiff:

(a) although all extension of time letters by the defendant were addressed to the architect (SP1 and SP3), there was no response from the architect as the architect choose to allow the plaintiff to decide upon the same (P43 to P69 at pp 262–266 of Bundle D1). The architect's representative (SP1) was never able to forward any number of days delay cause by plaintiff despite admitting that there were delays on the part of the plaintiff;

(b) the architect did not reject the defendant's claims for variation of works where else SP2 admitted that the variation of works was requested by the plaintiff and it was carried out by the defendant but all that SP2 did was attempted to negotiate between the parties for the VO works but it had failed. Therefore since the negotiations had failed now SP1 claims that he cannot certify the VO works. SP1 in his evidence states 'This variation work is requested by the developer as such I agree it is variation order. However there is a dispute as to the value of this works. Now I cannot just certify a variation work without a value and since the plaintiff and defendant were friendly party I invited them to discuss and conclude a price. At the meeting it was agreed that both parties will come to a consensus but unfortunately they did not' (refer to question 6 answer to VO No2 encl K of SP1 's evidence);

(c) after SP1 (the architect's representative) and SP2 (the plaintiffs director) completed with their evidence, the plaintiff called SP3 (the architect) to tender exh P153 (Re; certificate of non complete) which was prepared by SP3 on 7 November 2013. This trial was started on 30 August 2012. P153 in form of loose copy is addressed to the defendant stating that the defendant 'have failed to complete the works within the contract period (24 October 2010)' and pursuant to Clause 22 of the conditions of contract the plaintiff reserves the right to impose and deduct the LAD. SP1 had been challenged during cross-examination amongst others that there is no document from the architect certifying the number of delays for the plaintiff LAD claim. SP1 had agreed to this and further had went on to confirm that the architect's certificate is a must in order for the plaintiff to claim LAD from the defendant. Thus, the issuance of P153 by the architect after the commencement of the trial was done with purpose and improper motive; and

(d) on 13 July 2010, the CF was obtained for the project. On 27 September 2011 the defendant requested the architect to prepare the final certificate of account (D36). D36 was sent by registered post to the architect and delivered. But there is no reply by the architect. No explanation by SP1 or SP3 on the failure of the architect to reply to the defendant's letter/request for the VO claims.

[66] It is pertinent to note here that exh P153 was created/prepared after SP1 had completed his evidence in court and after being challenged drastically by the defendants on this fact. The question is why this document was only created on upon SP1 evidence being completed in court after three years of the completion of the project in the year 2010 and prepared only in the mid of this trial. During his evidence SP3 had answered that this document P153 was required by the court. Clearly, the intention here is to support the plaintiff's claim for the LAD. However, SP1 and SP2 did not deny that these VO works are carried out and completed.

[67] In the circumstances, it appears to me that there exist improper dealings between the architect and the plaintiff in denying the defendant's claim on the VO works. SP1 had during cross-examination admitted that all of these works had been carried out and completed. Further SP1 admitted that the above works was essential in order to ensure that there is no water retention in the neighbouring land and to meet the requirements imposed by the authorities, ie Bomba, MPK, Syabas etc.

[68] There had been no cross-examination by the plaintiff regarding the amount for the variation of works claimed by the defendant, apart from disputing and rejecting the VO claims on the two issues highlighted above there is no specific cross and dispute by the plaintiff as to its amount of each of the works carried out.

[69] Having considered the evidence, I hold that the defendant is entitled to claim the total sum of RM249,283 as being the VO claims for the following items:

(a) the sum of RM41.271 as additional works as per MPK's instructions for the project;

(b) the sum of RM6.084 for pre cast drain 600mm x 600mm, labour, backhoe excavate lorry remove earth, 26 meter;

(c) the sum of RM4,182 for underground drain 300mm x 300mm at walkway. Labour, backhoe excavate lorry remove earth with concrete 12 drain top with concrete skirt both side 22 meter (D9);

(d) the sum of RM2,080 for swear manhole 1 (for future connection) 6' HDPE pipe and heavy duty m steel cover. Labour, backhoe excavate and lorry remove earth. This work was required due to the fact that the plaintiff had requested for the TNB sub-station from single chamber to double chambers (D32, D31 and and D33 of Bundle F);

(e) the sum of RM1,5000 for Roller Shutter works carried out due to the plaintiffs request for the TNB sub station from single chamber to double chambers (P36 and D33);

(f) the sum of RM3,770 for variation works behind staircase two step change to one step, (completed with furnishing plastering labor to hacking off lorry remove)(D11, D12A and D12B);

(g) the sum of RM22,100 for labour supply and material OSD pond additional rebar at all manhole area (D35(3-12) and D16A);

(h) all the sum claimed RM11,580 + RM6,358 + RM9,100 + RM12.500) + RM200 + RM1400 + RM700 + RM500 + RM5,850 (refer to DW1-(DW-1) pg 36 (vii)-(xv) for TNB Single Chamber to double chambers (P62);

(i) the sum of RM5,340 for telephone wiring and pipe for future extension.Telephone 2nos manhole labour and backhoe excavate. Base casting with r.c. concrete (P14);

(j) the sum of RM12,000 for elephone pipe for future 150 meters x 2 ways = 300 meters. Top cover with concrete and Brc (D15A and D15B);

(k) the sum of RM16,000 for telephone 10 pair/0.63mm telephone cable from 50 pair telephone D/P to 10 pair telephone D/P c/w earthing system @ per unit RM500 32 units (D14 and D14A); and

(l) the sum of RM136,768 for pilling works 24m to 30m (P126, P19 and P24). The engineer had instructed the defendant that the piling is 30m. Hence, there is a difference for 6m depth per unit for 32 units.

(e) The sum of RM212,500 for the 1A unit being the defendant's share in PT468

[70] By virtue of letter dated 20 March 2008 (P24 p 85 Bundle D1) the plaintiff had agreed to adjust the contract sum by increasing the defendant's entitlement by 14 unit of the standard 2 storey shop office by giving Y2 share for unit No 26, PT 468.

[71] Based on the sale and purchase agreement (P133A) dated 17 May 2010, it discloses that the said unit was sold at RM425,000. Under these circumstances the defendant's 1/4 share entitlement in the said unit shall be RM212,500. Hence, I order for the sum RM212,500 be paid to the defendant.

(f) *The sum of RM15,300 being the cost of repair of the glass window which was broken by plaintiff*

[72] The defendant had lodged a police report regarding the broken window glasses which was installed at the project site (D2). However, the defendant had failed to prove that the broken window glasses was caused by the plaintiff. The defendant's claim for this special damages is dismissed.

CONCLUSION

[73] On the totality of the evidence adduced by the plaintiff through its witnesses SP1, SP2 and SP3 both testimonial and documentary evidence and having evaluated the evidence of the defendant's witnesses DW1 and DW2 and

documentary evidence, I am of the view that the plaintiff had failed to prove its claim on the balance of probabilities. The plaintiff's claim is accordingly dismissed with costs.

THE DEFENDANT'S COUNTERCLAIM

[74] On the other hand, I am satisfied that the defendant had discharged the onus of establishing their pleaded case and had succeeded in proving the defendant's counter claim on the balance of probabilities for the following claims:

(a) prayer the sum of RM57,600 being outstanding amount from the contract sum;

(b) prayer the sum of RM255,600 being 5% retention sum from the contract sum;

(c) prayer the sum of RM48,000 being refundable deposit amount paid by the defendant to the plaintiff;

(d) prayer the sum of RM249,283 for variation of works done by the defendant; and

(e) prayer (g) the sum of RM212,500 for 1/2 unit being the defendant's share in unit No 26 of PT 468.

[75] I therefore make order in term as prayed in prayers (a), (b), (c), (d), and (g) of the defendant's counterclaim. Interest at the rate of 5%pa is allowed for the said judgment sum to be calculated from the date of the filing of the counterclaim, that is 12 January 2012 till full realisation. Prayers in prayer (e), (h), (j), (k) and (l) of the defendant's counterclaim is disallowed.

COSTS

[76] The defendant is entitled to the costs of this action in the sum of RM30,000. I so order.

Plaintiff's claim dismissed with costs and defendant's counterclaim allowed in part with costs of RM30,000.

Reported by Afiq Mohamad Noor